Cir

No. 79-210

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1979

GLEN R. ANDREWS,

Petitioner,

vs.

A. WARREN CAHILL, Family Court Commissioner for Waukesha County; KENNETH KRAUSE, Attorney; PEB DUDLEY, Constable, and CITY OF OCONOMOWOC,

Respondents.

BRIEF IN OPPOSITION

[redacted] TO WRIT OF CERTIORARI

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REPLY TO WRIT OF CERTIORARI

STATEMENT OF FACTS

In Wisconsin, a divorce action is commenced by serving a summons; service of the summons commences a sixty day waiting period. After the expiration of the first sixty day waiting period, the plaintiff could then serve a complaint; service of the complaint commences a second sixty day waiting period. Thus, before a court could grant a divorce a total of 120 days must elapse.

During the interim period the rights of the parties are established in a temporary order. The initial hearing to establish the temporary order is held before the family court commissioner. The order can be reviewed by the county court, and after such review can be appealed to the State Supreme Court.

A common practice at the time the action is commenced is to petition the family court commissioner to set a hearing date for the temporary order and to preserve the rights of the parties and to maintain the status quo until such hearing. The family court commissioner upon such a petition orders the other party to appear, and restrains both parties from disposing of property, awards temporary custody of the children to one party, and at times, orders one party to vacate the home.

In this case such an order was entered and served on the defendant on August 22, 1973. The hearing was held five days later on August 27, 1973.

Paragraph 18 of the plaintiff's complaint alleges that no hearing was held before the family court commissioner. The record is undisputed that a hearing was held before the family court commissioner on August 27, 1973. The next hearing in the case was before the county court, in October, 1973, relative to plaintiff's failure to comply with the family court commissioner's order of August 27th. The plaintiff did not make a motion to return to the home at that time. (T-25)

On November 1, 1974, the plaintiff brought a motion to return to the apartment. (T-34) However, the wife had vacated the apartment 14 months previously. The plaintiff testified that by returning to the home he meant to return to his wife and the family unit, and not the apartment which he previously lived in. (T-34)

At the trial after it was proved that a hearing was held, and was held within a reasonable time after the ex parte order, five days; plaintiff then for the first time attempted to challenge the sufficiency of the hearing. The plaintiff did testify that his ability to raise the issue of vacating the premises was rebuffed by the family court commissioner at the time of the hearing. He further testified that the only documents served upon him prior to the hearing were a summons which he identified as Exhibit 1, and an order to show cause which he identified as Exhibit 2. (T-18, T-20) However, Exhibit 1 was not a summons as the plaintiff testified but rather was proof of service dated August 23, 1973 and indicated that a summons, petition for temporary relief, and an order to show cause were served upon the plaintiff on August 22, 1973. The plaintiff did not introduce the petition for temporary relief into evidence.

REASONS FOR DENYING WRIT

THE FAMILY COURT COMMISSIONER PROTECTED BY JUDICIAL IMMUNITY

The first issue raised by the Petitioner is that the Trial Court rejected his testimony as incredible relating to the Family Court Commissioner's handling of the hearing. Mr. Andrews contended that he was not given an opportunity at the hearing to contest the order to vacate.

The second issue raised is the personal liability of the family court commissioner. Both issues are answered by application of the doctrine of judicial immunity. In *Pearson* v. *Ray* (1967), 386 U.S. 547 the court held that Congress did not intend to abolish the common law immunities in adopting the Civil Rights Act and that such immunities remain intact. Judicial immunity has been expanded to protect prosecutors as well as judges by the court's decision and by *Imbler* v. *Patchton,* 96 S. Ct. 984 (1976). In a recent case of *Stumpf* v. *Sparkman,* 434 U. S. 349 (1978) the court reaffirmed the doctrine of immunity because the action he took was in error, was done maliciously, or in excess of his authority.

The petitioner then argues that the Family Court Commissioner failed to comply with the guidelines in *Geisinger* v. *Voss* (E. D. Wis. Dec. 26, 1972) 353 F. Supp. 104 and thus should be personally liable. The trial court held to the contrary, and decided that the hearing was held within a reasonable time after issuance of the ex parte order, five days. The Court of Appeals noted among the grounds for divorce alleged by Andrews' wife was the ground that Andrews had threatened her life. Petitioner failed to meet the burden of proof in this action.

CONCLUSION

The trial court specifically held that the petitioner's testimony was incredible and rejected it relative to what occurred at the hearing in the Family Court Commissioner's Office. This hearing is clearly subject to judicial immunity. The petition should be dismissed.

Respectfully submitted,

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